IN THE

Supreme Court of the United States

October Term, 1977

No. 77-480

LOCAL 259, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ANTHONY DAZZO,

Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF INTERVENOR IN OPPOSITION.

WILLIAM J. CROSSIN
Attorney for Intervenor
65 Prospect Avenue
Larchmont, N. Y. 10538
(914) 834-5441

Counsel of Record:
WILLIAM J. CROSSIN
WALTER J. KENNEY, Jr.
CROSSIN & CROSSIN
65 Prospect Avenue
Larchmont, N. Y. 10538

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Miscellaneous:

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BRIEF OF INTERVENOR IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

On February 16, 1977, Anthony Dazzo, moved in the court below to intervene as a party to this action pursuant to Rule 15 (d) of the Federal Rules of Appellate Procedure, and that motion was granted on February 23, 1977.

"A" references herein designate page numbers of the Appendix in the Court of Appeals.

QUESTION PRESENTED

Whether there was substantial evidence to support the finding of the National Labor Relations Board, and the court below, that Local 259 violated § 8 (b) (1) (B) of the National Labor Relations Act by restraining or coercing an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances?

STATEMENT OF THE CASE

The petitioners description of the events herein omits certain facts which we would point out:

In addition to Louis Salvatore ("Salvatore") and Steve Elliott ("Elliott") who were salaried officials of the union, Local 259 called as witnesses Edward Zegilla ("Zegilla") Robert McDonald ("McDonald") and Walter Sitler ("Sitler"). Zegilla, McDonald and Sitler, who in addition to being employees of Atherton Cadillac, Inc. ("Cadillac") were Local 259's organizing committee prior to its certification as Cadillac's collective bargaining representative, (A33) and after such certification these same men, together with Salvatore and Elliott formed Local 259's committee to negotiate a contract with Cadillac. (A 34).

Elliott testified that, prior to Dazzo's discharge, that he had a meeting with the employees of Cadillac in order to discuss contract proposals, and at this meeting the employees were very upset and calling Dazzo most every name under the sun (A 68). Despite the fact that the employees did not demand that Dazzo be terminated, Elliott said he knew that they wanted Dazzo to go because of the language they used in describing him. (A 75) When Elliott was questioned

if the employees asked him to bring us Dazzo's status in the negotiations, Elliott replied: "No , No, I don't recall. I don't recall. Possibly, I don't recall". (A 68).

Similarly, Zegilla testified that it was a general feeling amongst the men that they wanted as much money as they could get so long as Dazzo was there. Zegilla said that he believed this despite the fact that he testified that the men themselves never voted on Dazzo's removal and never discussed how they felt. (A69)

Sitler testified that prior to Dazzo's discharge, he had knowledge and there was talk among the bargaining committee that Dazzo might be terminated. (A 124). Dazzo testified that Sitler admitted to him that he was aware that Dazzo was going to be terminated a week before it happened and when Sitler raised his objection, he was told by the other members of the negotiating committee to shut up and dont make waves, that they know whats best for the shop. (A 109).

Elliott testified that, on January 30th, he received a telephone call from Local 259's president that there was a work stoppage at Cadillac. (A47) This work stoppage or slowdown, occurred because Mc Donald claims he observed one customer being refused service by a Cadillac service writer. Then Mc Donald claims that he, without checking with either Dazzo or Mr. Atherton, told the Cadillac employees that Dazzo was turning away work. (A145-46, 154-55)

Elliott admitted that he did not admonish or even critize McDonald for the slowdown that he initiated, or for his comments to Atherton Jr. that the problem is Dazzo and suggesting that Dazzo be replaced by Ernie Barter who was a member of Local 259 (A 147-48).

Elliott testified that not only did he take a strike vote of the employees on January 31st, but that he distributed strike signs to McDonald in the parking lot of Cadillac on January 31st. (A 48). This was a month prior the time when Local 259 allegedly intended to strike. (A 48-49).

Elliott testified that the respondent's negotiating committee was informed of Dazzo's discharge by Atherton Sr. (A 71) and that when respondent's agents reported the progress of the negotiations to the men, "they were thrilled to death when they heard Tony got the axe." (A 71)

Zegilla stated that Dazzo's termination was a "large event in the contract negotiations, not easily forgettable". He thought it more important than obtaining a holiday. (A 167)

THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

In the trial herein the Intervenor, then called the Charging Party, was represented only by the General Counsel for the National Labor Relations Board. At the conclusion of the trial the Administrative Law Judge ("ALJ") directed that both the General Counsel and the attorneys for Local 259 submit briefs supporting their respective positions. However, the General Counsel failed to submit a brief. The attorneys for Local 259 did submit a brief which was the only brief before the ALJ when he rendered his decision.

THE DECISIONS of the BOARD and the COURT of APPEALS

Subsequent to decision of the ALJ the Intervenor's Counsel and the General Counsel filed briefs

excepting to the decision of the ALJ, and the attorney's for Local 259 filed another brief in opposition thereto. The Board did not adopt the decision the ALJ but found against Local 259. Thereafter, the Court of Appeals unanimously affirmed the Board after considering additional briefs submitted by the parties and hearing oral argument.

REASONS FOR DENYING THE WRIT

1. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS ARE IN ACCORD WITH PAST PRECEDENT AND PJBLIC POLICY AND THERE IS SUBSTANTIAL EVIDENCE IF NOT OVERWHELMING EVIDENCE TO SUPPORT THEIR DECISIONS.

a) Local 259 Did Restrain Or Coerce The Employer Within The Meaning Of The Act.

Local 259 mentions free speech guaranteed by the Constitution in the caption of its first argument but fails to mention it thereafter. The free speech arguments, either under the Constitution or § 8 (c) of the Act, were not raised below. Apparently, Local 259's arguments on this point are that its conduct was merely an expression of views protected by § 8 (c) of the Act and, inasmuch as Unions do not control employers, its noncoercive statements cannot form the basis for a finding of a violation of the Act.

We believe that Local 259 is begging the question by these arguments. Section 8 (c) of the Act would shield Local 259 only if its "expression contains no threat of reprisal or promise of benefit" and, of course, if its statements, or for that matter its conduct were noncoercive then Local 259 did not violate the Act. However, that its conduct expressed a threat of reprisal or promise of benefit, and was coercive was the factual finding of the

Board.

The decisions below were based upon the facts in this case. This is not the type situation where a court of appeals has rendered a decision in conflict with this court or another court of appeals, or decided a state or territorial question, or the court of appeals so far departed itself, or sanctioned a departure by a lower court, from usual judicial proceedings. The decisions below turned on the facts herein. There is no dispute as to the law; if Local 259's conduct was coercive then it violated the Act, and if it's conduct was noncoercive then it did not violate the Act.

The first premise of Local 259 on the point that they did not coerce the employer is that there is no evidence that their tactics involved physical force, or threats of force or economic reprisal. Therefore, they contend that there is no evidence that they coerced the employer.

Apparently, Local 259 is implying that "coercion" and physcial force are synonymous. For that proposition they rely on NLRB v. Drivers, Chauffers, Helpers Local Union No. 639, etc., 362 U.S. 274. The question in that case, as stated by the Court, was "whether peaceful picketing by a union, --- is conduct of the union" to restrain or coerce" employees under § 8 (b) (1) (A) of the National Labor Relations Act ---." at 275. The Court stated that unions had the right to strike and to prohibit peaceful picketing would obviously impede the right to strike, and that Congress has been rather specific when it has come to outlaw economic weapons of the union. at 282-283. The Court stated that picketing is a sensitive area, and that the central theme of thelegistrative debate on this statute was not the curtailment of the right to

peacefully strike, but rather the elimination of the use repressive tactics bordering on violence or involving particularized threats of economic reprisal at 287.

Clearly, the cited case is concerned with a unions right to peacefully picket which is much different from the issues present in the instant situation. The Court did not equate "coercion" with physical force, but did equate it with threat of reprisal, or force, or promise of benefit, at 284.

Local 259 did not have the right to have Dazzo terminated, but they did have the obligation to bargain in good faith with the employer absent the condition that Dazzo be terminated. Their insistance on the latter condition was under threat of economic reprisal or promise of benefit. Specifically, that they would reduce their demands and enter into good faith negotiations with the employer. This fact was made clear to Atherton Sr. by their conduct, and by Salvatore at a negotiating meeting: "Your manager (Dazzo) is making things tough, harassing the committee, this is why the men are not being flexible and why they want the contract terms that have been proposed." (A 72, 73).

Although the case cited by Local 259 does not support its position, it is appropriate to consider how therein the Supreme Court took pains to ascertain congressional intent in order to determine the meaning of 8 (b) (1) (A). Similarily, in the present case the Court need only look to statements made by the authors of 8 (b) (1) (B) to determine what the Act was intended to prevent:

> "In the Senate Report No. 105 on S. 1126 in explaining Section 8 (b) (1) (B), it was stated:

> ...also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

In the Congressional Record of April 23, 1947, page 3953, Senator Taft in explaining this section said... employees can not say to their employer, "We do not like Mr. X. We will not meet Mr. X. You have to send us Mr. Y." That has been done. It would prevent their saying to the employer, "You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work." (or negotiate a contract).

On April 28, 1947, Senator Ellender (p. 4266 in the Congressional Record) spoke in support of the legislation as follows:

> "I shall now deal briefly with strikes invading the perrogatives of management... The Bill, in subsection 8 (b) (1) on page 14, makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of his bargaining representatives or in the selection of a personnel director or foreman or other supervisory officials. Senators who heard me discuss the issue early in the afternoon will recall that quite a few unions forced employers to change foreman. They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership

> of the Union. This amendment seeks to describe a remedy in order to prevent such interference".

This is precisely the activity which was engaged in by the union in the present case.

Local 259 seems to claim that they merely suggested or persuaded Atherton, Sr. to terminate Dazzo, and such cannot be construed as a restraint or coercion. This position is completely untenable.

> "A threat directed to an employer to shut down a job unless an employer complies with a union demand to remove a supervisor and its' representatives from the job is the most obvious kind of statutory coercion"
> San Francisco-Oakland Mailers Union # 18
> (172 NLRB 248, 252 -69 LRRM 1157 1968)

Here,a work stoppage was initiated to protest Dazzo which is more than a mere suggestion. In addition, there was a threat of a strike, actual signs were prepared and negotiations were stymied. All of these acts were directed at Dazzo's removal. Surely this conduct amounted to more than a mere suggestion, and the Board so found.

Moreover the cases cited by Local 259 are not applicable to the present case. Petitioner cites Local 80, Sheet Metal Workers (Turner-Brooks, Inc. 161 NLRB 229. In that case, the union demanded that Turner-Brooks sign a contract that included a non mandatory provision. The union threatened to strike and did in fact strike. But the parties stipulated not to raise these issues of the threat and the strike so the

Board naturally found no violation of 8 (b) (1) (B). In effect they invited the Board not to find a violation. The same result might be reached here if we had stipulated not to raise any issues as to Local 259's actions, and then asked the Board to consider whether the union had violated the Act.

Local 259 also cites Sakrete of Northern California Inc. v. NLRB - 332 F 2d, 909 (9th cir. 1964) cert. den 379 U.S. 961. First of all this case did not involve an 8 (b) (1) (B) violation. The union proposed that supervisors be covered by the union agreement. The employer could have rejected this proposal but instead refused to bargain at all. The court held that the refusal to bargain by the employer was unlawful. Here the union refused to bargain in good faith until Dazzo was removed. Apparently this case supports the intervenor's position.

In summary Dazzo claims that he was wrongfully discharged in violation of section 8 (b) (1) (B) of the act and the Board so found. There was far more than a persuasion or a mere suggestion. See e. g. Local 423, Laborers' Int. Union of N. America (Mansfield Flooring Co.) 195 NLRB 241; Communication Workers of America, Local 2550, 195 NLRB 945; International Typographical Union, 86 NLRB 951; Los Angeles Cloak Joint Board, ILGWU (Helen Rose Co.) 127 NLRB 1543; N. L. R. B. v. Local 964, United Bro. of Carpenters, 447 F 2d 643 (CA 2 1971).

In fact, in N. L. R. B. v. Local 964, United Bro. of Carpenters 447 F. 2d 643 (2d cir. 1971), the union suggested to various contractors that they were members of the wrong association. They also told the contractors that it would be wise to sign contracts with the union individually rather than through the association. The court stated:

> "We have held that the right of employees and the corresponding right of employers--- to choose whom ever they wish to represent them in formal labor negotiations is findamental to the statutory scheme" G.E. v. NLRB 412 F 2d 512, 516 (2d cir 1969).

Thus the court found that the union "suggestions" amounted to threats and coercion hence violating section 8 (b) (1) (B) of the Act.

b) The Substantial Evidence Test

"Substantial in this context means such evidence as would prevent the direction of a verdict in a jury trial". NLRB v. Grease Co. 94 LRRM 3197 (2d cir. Mar. 30, 1977), or "upon the motion of a defendant for a directed verdict, the trial judge should overrule the motion unless, viewing the evidence in the light most favorable to the plaintiff, there would be no substantial evidence to support a jury verdict if returned for him. This principal is so well settled as to require no citation of authority". Hinton v. Dixie Ohio Exp. Co. 188 F 2d. 121, 124 (6th cir. 1951). See also Baltimore & Or Co. v. Postom 177 F 2d. 53 (D.C. cir. 1949); Thompson v. Lillehei 273 F. 2d 376 (8th cir. 1959); Schneider v. Chrysler Motors Corp. 401 F 2d 549 (8th cir. 1968).

We agree with petitioners position that it has to be more than a scintilla. It is submitted that not only is there substantial evidence but there is overwhelming evidence here:

January 10 -- Dazzo laid off Zegilla and five or six other employees. (A98-99);

January 17 -- Dazzo had a dispute with Zegilla and Salvatore. (A 176, 175, 10);

January 20 -- After another argument, Salvatore declares war on Dazzo. (A 42);

January 21 -- Salvatore tells Atherton Sr. that Dazzo is causing trouble. (A 45);*

January 22 -- Elliott and Zegilla know from a meeting of the employees, that they don't like Dazzo and want him to go. (A 75, 169);

January 30 -- McDonald causes a work stoppage to protest Dazzo. Atherton Jr. asked why the men stopped work. McDonald replied that it was because of Dazzo, and recommended a replacement for Dazzo. (A 148);*

January 31 -- Elliott took a strike vote of the Cadillac employees and distributed strike signs to McDonald. (A 49).

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* Indicates that both the Administrative Law Judge and the Board substantially included these facts in their findings.

Feb 3 or 11 -- Salvatore tells Atherton Sr. that the respondent proposed the contracts that it did, and is being inflexible, because of Dazzo. (A 72;*

Feb 11 or 27- Atherton Sr. fires Dazzo and tells him that he did so because respondent demanded it in order to negotiate a contract. (A 103, 35);*

Zegilla says Dazzo's termination was a large event in the contract negotiations. (A 167);

Elliott says the men were thrilled to death when they heard Dazzo got the axe. (A 71);

Salvatore and Elliott said because Dazzo was fired, they were told by the employees to reduce their demands. (A 57);*

February 27-- Union demands substantially lowered - union agrees to work past strike deadline. (A 57);*

March 3 -- Contract is signed with reduced demands accepted. (A 58);*

It is not the function of the court to make de novo finding of fact or substitute its own opinion for that of the Board. NLRB v. Custom Chair, 422 F 2d 1300

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* Indicates that both the Administrative Law Judge and the Board substantially included these facts in their findings.

(9th cir. 1970). The court should up hold the decision of the Board even when the court might reach a different decision or conclusion. NLRB v. Local 3 IBEW AFL-CIO, 477 F. 2d 260 (2d Cir. 1973) cert. den. 414 1065.

The instant case has already been thoroughly briefied and argued by both sides and then considered by the Board and the Court of Appeals, both of which found in favor of the Respondent.

c) The Inferences Drawn By The Board Were Based On Substantial Evidence

Local 259 devotes a great deal of its arguments in attempting to substitute its reasoning for that of the Board. "This type of approach confuses the issue. The real issue is: "Is there substantial evidence to support the Board's findings?"

It is true that there have been cases where the Board's findings were found not to be based on substantial evidence. For example, where the only evidence was the sole testimony of the affected employee who stood to gain substantially by his reinstatement with back pay. This is true in the cases cited by the respondent. All have a common element. There was evidence that the employee was fired for misconduct or incompetence. See e.g. Farmers Cooperative Co. v. NLRB, 288 F. 2d 296 (8th cir. 1953); NLRB v. Grease Co., 94 LRRM 3197 (2d cir. 1977) However, this is not the posture of the present case, the board did not base its decision on Dazzo's testimony - "Hearsay" - in fact it did not even consider his testimony, but based on Local 259's witnesses found:

"While it is true that Dazzo's discharge was never openly demanded, the record reveals an extensive pattern of statements and conduct through which respondent conveyed a clear message to the employer to discharge Dazzo and evidenced its unlawful motive. Thus, after an argument concerning the layoffs, for which Dazzo was responsible, respondent's representatives "declared war" on Dazzo. Atherton Sr., was thereafter told that Dazzo was creating trouble. After the slowdown, McDonald told Atherton Jr., that the problem was Dazzo and suggested a replacement for him. During the negotiations, Salvatore admitted that the bargaining strategy and proposals and the flexibility with respect thereto were because of Dazzo. In sum, respondent's message to fire Dazzo and its hostility toward Dazzo were repeatedly communicated to the employer".

"We view as particularly significant the fact that shortly after Dazzo's discharge respondent substantially lowered its bargaining demands and agreed to negotiate past the strike deadline of March 1; in fact, agreement was reached on March 3. This change in bargaining strategy occured after Salvatore met with Cadillac's service department employees on February 27. At this meeting, the employees, who had

> previously protested the shop conditions for which Dazzo was responsible and who had previously said they could not work with Dazzo, told Salvatore to try and wrap up negotiations, modify their bargaining proposals, and reason with management because the biggest problem, Dazzo was gone. We are additionally persuaded by the fact that the employer discharged Dazzo only after it was clear that bargaining was hopelessly stymied." (A 20).

The facts in this case are almost identical to Communications Workers of America Local 2550, 195 NLRB 945. In that case 300 workers walked out claiming to have numerous grievances. The company and the union tried to negotiate these grievances but got stymied on their negotiations. The union informed the employer that "Grimes (Dazzo) was at the heart of the problem and that the employees would be more inclined to return to work if Grimes (Dazzo) was removed from (his) position." Subsequently the company diluted Grimes authority and the company and the union worked out their grievances and the employees returned to work. Although Grimes was not fired, nor transferred to ALJ found a violation of 8 (b) (1) (B) of the Act.

Here in this case, Atherton and the Union were stymied over contract negotiations. Salvatore, a union official told Atherton that the union is being inflexable because of Dazzo. McDonald told Atherton Sr. "the problem is Dazzo". Atherton fired Dazzo and said the problem is gone. (A 130-31). Dazzo is fired, the union lowers its demand and an agree-

ment is reached. But, here in addition to Salvatore's statement, there is other volumonous evidence that the union wanted Dazzo to go - Salvatore declared was on Dazzo - Salvatore told Atherton that Dazzo is causing trouble - a work stoppage is commenced to protest Dazzo - and Dazzo is finally fired. It is submitted that there is not only substantial evidence but overwhelming evidence. See NLRB v. Bausch and Lomb Inc. 526 F 2d 817 (2d cir. 1975).

Another point raised by Local 259 which should be quickly put to rest is that there is no evidence in the record that McDonald or any other employee had any authority to act as agents of the union for the purpose of putting pressure on the employer to get rid of Dazzo. Apparently, what it is being referred to here is a work stoppage which was initiated by McDonald and McDonald's remark to Atherton Jr. that the "problem is Dazzo" and his suggestion of a replacement. In effect the Local 259 is saying because no union officials were present or McDonald had no authority, the union cannot be held responsible. This is not correct. The stoppage was called to put pressure on the employer to get rid of Dazzo, and McDonald so informed Atherton. The union knew of the stoppage and Mc Donald's statement and not only took no action, but did not even question McDonald about it. In other words, they approved it.

In United States Steel v. U.M.W. § 19F 2d 1249 the court stated that a union should take action against its agents to purge itself of an inference that the union condoned its activities.

Stated simply when a member, (McDonald) who is also a member of the unions organizing committee, institutes a work stoppage for an illegal purpose to wit - to pressure the employer to remove Dazzo which is a violation of 8 (b) (1) (B). The union cannot close their eyes and be idle and claim lack of authority. See Tennaco v. Teamsters, 520 F 2d 945. The fact that no disciplinary action is taken is a factor to consider in determining whether the union authorized such illegal activities. See NLRB v. Local 815 BEW, 290 F. 2d 99, 103-104, NLRB v. ILA Warehouse Union 283, F 2d 558. Common law principals of agency apply and lack of action on the part of the union can create an adverse inference; actual ratification is not necessary. See NLRB v. Local 3 IBEW, 467 F 2d 1158 (2d cir. 1972) See also 29 U.S.C. § 185 (e).

Here McDonald caused a stoppage to force Dazzo out and that was his stated purpose of causing the stoppage. He was not just an ordinary union member, but actively negotiated a contract on behalf of the union and was a member of its organizing and negotiating committees. The union by its inactivity acquiesced to his actions and are bound by them. U.S. Steel v. UMW, Supra.

2. IN THE INSTANT CASE THE BOARD, BASED ON WELL ESTABLISHED PRINCIPLES OF LAW, PROPERLY REFUSED TO DRAW AN ADVERSE INFERENCE FROM THE GENERAL COUNSEL'S FAILURE TO CALL AS A WITNESS AN INDIVIDUAL WHO WAS EQUALLY AVAILABLE TO BOTH SIDES.

It is true that there are situations in which

an adverse inference may be drawn for failure to call a witness who might give relevant testimony. But those cases are limited to instances where the witness is under the control of the party. The rule has nothing to do with who has the burden of proof. Petitioner cites cases which hold that the Board has the burden of proving a violation. We do not dispute that the Board has the burden of proving an 8 (b) (1) (B) violation by substantial evidence. But none of the cited cases hold that the party who has the burden determines whether or not to draw an inference.

The test is rather, was the witness under the control of one of the parties or was he equally available to both parties. In the former instance the courts have held an adverse inference may be drawn. In one case cited by the union the court held that an adverse inference was proper because the witness was an employee and under the control of the claiming party. Kean v. CIR. 469 F 2d 1183. However, the same court went on to state that:

> "When a potential witness is equally available to both parties, no inferences should be drawn from the failure of a party to call such witness". at 1187

This principal has been a long standing rule of evidence. See 2, Wigmore, Evidence Section 288, McCormack, Evidence § 249. Wagner v. U.S., 264 F 2d 524, 531 (9th cir. 1959) cert den 360 U.S. 963. Lannon v. United States, 401 F 2d 504 (9th cir. 1968); Johnson v. United States, 291 F 2d 150 (8th cir. 1961)

In this case, Atherton was Dazzo's former employer, but he had a contractual relationship with the union - he was both physically available and legally available to both parties. See Sarnish v. United States. 223 F 2d 358, 365 (9th cir 1955).

Local 259 relies on NLRB v. Ford Radio & Mica Corp. 258 F 2d 457 (2d cir. 1958). The witness involved was disinterested. There was substantial evidence that employees were striking to force management to rehire a supervisor. The only evidence to the contrary was the sole unsupported testimony of the claimant - indeed his testimony was contradicted. The only way he could have supported his claim was by producing a disinterested witness, a policeman. He did not and the court drew an unfavorable inference.

This is not the case here - Dazzo's testimony was not even considered. Atherton was not a disinterested witness - he had a contract with the union which was charged with the present violation, and presumably would be interested in preserving labor peace. At the time of the hearing Dazzo had no relationship to Atherton. If anything the witness was more available to the union. So the Board was correct in refusing to draw an adverse inference. See Wigmore, Evidence Section 288.

It stretches legal reasoning that this issue justifies the granting certiorari. The legal principal is well established. Its application like the major premise herein, coercion, is dependent upon the facts in the particular case. None of the criteria are present which ordinarily are concomitant with Supreme Court review by certorari. "As has been many times declared this is a jurisdiction to be exercised sparingly and only

in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions." Hamilton-Brown Shoe Co. v. Wolf Bros. Co., (1916) 240 U.S. 251, 258, 36 S. Ct 269, 60 L. Ed 629.

In the present instance, there are no commanding constitutional issues, no problems of foreign relations, and no decisions in conflict. Petitioner is really asking the Supreme Court to review a factual issue with the hope in mind that lower court error might exist. As Chief Justice Vinson said in an address to the American Bar Association in 1949:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions... The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States and to exercise supervisory powers over lower federal courts. If we took every case in which an interesting legal question is raised or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed on the Court." (Vinson, "Work of the Federal Courts". Address to the American Bar Association September 7, 1949, 69 Supreme Court Reporter V).

CONCLUSION

FOR THE REASONS STATED, the Petition for a Writ of Certiorari should be denied.

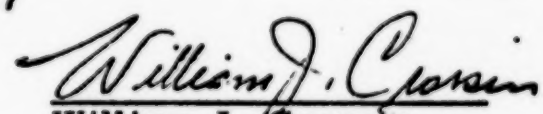
Respectfully submitted,
William J. Crossin
65 Prospect Avenue
Larchmont, New York 10538

Counsel of Record:
William J. Crossin
Walter J. Kenney, Jr.
Crossin & Crossin
65 Prospect Avenue
Larchmont, New York 10538

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on three copies of this Brief of Intervenor in Opposition were mailed, postage prepaid, to the attorney for Petitioner, Richard Dorn, 380 Madison Avenue, New York, New York 10017, and to the attorney for Respondent, Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570.

Dated: November 9, 1977



William J. Crossin
Counsel for Intervenor

65 Prospect Avenue
Larchmont, New York 10538
(914) 834-5441